91-1674

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,
Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continue on overleaf]

STAR MARKET COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Defendants.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court-appointed Teamster officers, acting under the color of law, the United States Attorney and the District Court did deprive Star Market of due process of law by effectively taking and enforcing, without notice or evidentiary hearing, a "default judgment" against Star Market, setting aside the result of a collectively bargained, lawful arbitration award?

2. Whether the court-appointed Teamster officers, the United States Attorney and the District Court did act jointly to avoid the exclusive jurisdiction of the National Labor Relations Board and the preemptive and exclusive scope of section 301 of the Labor-Management Relations Act, thereby splintering a well-established and coherent pattern of remedies under federal labor law?

LIST OF ALL PARENT COMPANIES AND SUBSIDIARIES OF EACH CORPORATION

Petitioner Star Market Company is an unicorporated division of Jewel Food Stores, Inc., a wholly-owned subsidiary of Jewel Companies, Inc., a wholly-owned subsidiary of American Stores Company, a Delaware corporation. American Stores Company is a publicly traded corporation.

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UNITED STATES OF AMERICA,

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STAR MARKET COMPANY

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Star Market Company ("Star Market"), respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered on January 22, 1992.

OPINIONS BELOW

The Opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 1992 U.S. App. LEXIS 1450, 139 BNA L.R.R.M 2646 and is

reprinted in the Appendix at A-8. The Opinion of the United States District Court for the Southern District of New York is reported at 776 F.Supp. 144 (S.D.N.Y. 1991) and is reprinted in the Appendix at A-25.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Petitioner seeks this Court's review of a decision by the Court of Appeals affirming entry by the District Court of an Order in the nature of Contempt against Petitioner and directing it to reinstate a discharged employee, contrary to a prior decision of an impartial Arbitrator, all in violation of the rights of Petitioner protected under the United States Constitution and federal law. A panel of the Court of Appeals denied Petitioner's appeal on January 22, 1992. This Petition has therefore been timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of...property, without due process of law, nor shall private property be taken for public use, without just compensation.

The statutory provisions involved in this case are sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157 and 158, section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, and the Racketeering Influenced and Corrupt Organizations Act, 29 U.S.C. §§1961, 1962 and 1964. These statutes, or pertinent parts thereof, are reproduced in the Appendix at A1-A6.

THE CHALLENGED CONSENT DECREE, ELECTION OFFICER DECISION AND ORDER OF CONTEMPT

On March 14, 1989, the District Court approved a Voluntary Consent Order ("Consent Decree") which ended major litigation brought by the United States Attorney for the Southern District of New York ("U.S. Attorney") against the International Brotherhood of Teamsters ("IBT" or "Teamsters"), the criminal conspiracy known as "La Cosa Nostra" and individual IBT officers. This litigation had as the government's goal to rid the IBT of organized crime influence and open IBT elections to a more democratic process. There is no record evidence even to suggest that Star Market was ever involved in any activity giving rise to the RICO complaint against the IBT and La Cosa Nostra. Neither Star Market nor any other employer had any part in either the litigation or Consent Decree.

On September 3, 1991, the Teamster "Election Officer," appointed under the Consent Decree, without any opportunity for Star Market to confront the evidence and witnesses against it or present its own evidence, issued a written final decision vacating a collectively-bargained Arbitral Award in favor of Star Market, which Award had affirmed the discharge for dishonesty of a Star Market employee. This Arbitration Award on its face and under existing federal labor laws was a final judgment on the merits of all claims raised by this employee against Star Market. On October 26, 1991, the United States Attorney requested the District Court to find Star Market in contempt for failing to "obey" the Teamster Election Officer's decision. After argument, *but without any evidentiary hearing,* the District Court affirmed the Teamster Election Officer's decision and ordered the Contempt relief jointly requested by the Unites States Attorney and the court-appointed Teamsters. The relief was such that Star Market had either to

reinstate the employee to employment, pay him all back pay and benefits or face a $10,000 a day fine.

The Consent Decree, in pertinent part, and Teamster Election Officer's summary decision are reprinted in their entirety in the Appendix at A44 and A113.

STATEMENT OF THE CASE

On September 9, 1991, while acting under color of law, the Teamster Election Officer issued a final decision, in effect a default judgment without notice, stripping Star Market of its rights under the Arbitration Award. Without notice to Star Market of the charges against it, without hearing and without any confrontation of the evidence or witnesses against it, *sua sponte,* the Teamster Election Officer rejected the Arbitration Award rendered pursuant to the collective bargaining agreement ("CBA") between Star Market and an individual Local of the IBT and sealed the evidentiary record. The Teamster Election Officer did so, solely in furtherance of Consent Decree goals sought by the federal government and/or the IBT.

The Arbitration Award had affirmed the discharge of Star Market's employee, Neal Henderson, for stealing time from his employer. The Teamster Election Officer "ordered" Henderson reinstated to his job, made whole in back pay lost, but permitted Henderson's discipline by "written warning" only. Clearly, the fact of Henderson's misconduct is not in dispute – only the penalty imposed.

On May 2, 1991, Star Market, a Boston-based food retailer, had discharged Henderson, a warehouse employee, Teamster Local shop steward and "candidate" in the 1991 IBT National Election. Henderson was discharged for an act of dishonesty – leaving his job and Star Market premises without permission and *while being paid,* a totally improper practice under the CBA. Henderson filed a grievance under the CBA and apparently filed two "Election protests" with the Teamster

Election Officer. The second of these protests serves as the factual basis for much of Petitioner's Due Process arguments to this Court.

In his *first* election protest (A61), the *only* protest ever sent to Star Market by the Teamster Election Officer, Henderson alleged that, as a "reform candidate", he was likely to suffer retaliation by his fellow Teamsters during the "Joint Committee" grievance step, a process previously dealt with by this Court in many cases.[1] Henderson's second election protest (A62) claimed that his discharge was motivated by Star Market's bias against him, based on his union activities, including his participation in the IBT election. It is important to note that this *second* election protest, alleging this company bias, was not served on Star Market until October 24, 1991, long after the Election Officer's decision – after Contempt proceedings had already been commenced.

The CBA (A57) contained a two-step grievance process, the Joint Committee step, followed by arbitration if resolution of the grievance was not there obtained. Henderson's Teamster bias election protest was sent to Star Market, but became moot when the Joint Committee deadlocked, sending the grievance to the next step – *impartial* Arbitration (A66). The Teamster Election Officer did not participate in any step of Henderson's grievance. Rather, and contrary to the Consent Decree Election Rules (A207), the Teamster Election Officer "deferred" his decision until *after* the hearings were held and *well after* an Arbitral decision was rendered (A63).

Unaware of the existence of the company bias election protest and knowing only that the Teamster bias election protest had become moot, during the arbitration

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1. *See, e.g., DeCostello v. Teamsters,* 462 U.S. 151 (1983); *Vaca v. Sipes,* 386 U.S. 171 (1967) and *General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Company,* 372 U.S. 517 (1963).

hearing held on June 12, 1991, Star Market responded to all known allegations against it, confronted the known evidence and witnesses against it and introduced evidence on its own behalf. The Local Union and Henderson presented to the Arbitrator their allegations and evidence, including evidence on the issue of company bias against Henderson due to his IBT election candidacy. Weighing the evidence presented in light of the CBA, including the provision that "[T]he company and the Union agree that there will be no *discrimination by the company* or the Union against any employee because of his or her membership in the Union or because of any employee's lawful activity and/or support of the Union" (A58) (Emphasis added), the Arbitrator found that Star Market had met its burden in showing that Henderson's discharge was "justified" under the CBA (A68-A112).

On September 9, 1991, before Star Market had even been served notice of the company bias election protest, the Teamster Election Officer notified Star Market of his final decision on the merits of this second protest (A128). In overturning the Arbitration result, the Election Officer also closed the evidentiary record. While purporting to rely on the Arbitration's record evidence, the Teamster Election Officer based his decision on evidence only before him, and specifically on three items of evidence never confronted by Star Market during the Arbitration hearing. To date, this "evidence" has never even been seen by Star Market, although Star Market has repeatedly asked to see it (A212, 221). For example, the Teamster Election Officer relied upon a post-arbitration company memo and the inferences he drew from that memo. Also, the Teamster Election Officer relied upon statements by two persons – one who never testified during the Arbitration and a second who testified but whose "evidence", at least as set forth in the September 9th decision, was different from that in the Arbitration.

When Star Market sought review to the Teamster Independent Administrator (also appointed under the Consent Decree), the decision of the Teamster Election Officer announced that, "absent extraordinary circumstance," no evidence, which had not been submitted to him in his decision-making process, could be relied upon in appeal to the Teamster Independent Administrator (A137). In short, Star Market was locked into an evidentiary record, prepared *ex parte* by a court-appointed Teamster, having the same effect as if Star Market had defaulted judgment. Having had no notice of continuing, active charges against it (as opposed to the moot Teamster bias election protest), Star Market had had no reason to submit evidence to the Teamster Election Officer and never again was Star Market given the chance to do so.

The Teamster Independent Administrator affirmed the Teamster Election Officer's decision (A138), ignoring the due process issues raised by Star Market relating to the company bias election protest. Indeed, the court-appointed Teamsters have categorically refused, even to this date, to show the contents of the Teamster Election Officer's file and the alleged "evidence" against Star Market (A217). Citing to the "extraordinary circumstances" of denial of due process, Star Market continued to challenge the Teamster Independent Administrator's affirmance and the right of the court-appointed Teamsters[2] to order Star Market to act in matters regulated by collective bargaining. While the Consent

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2. Paragraph 12(B)(ii) of the Consent Decree that defines the powers of the Court Appointed Officers and provides that the Independent Administrator shall have the power to void contracts which he reasonably believes constitute or further an act of racketeering activity or furthers or contributes to the association directly or indirectly, of the IBT or any of its members with the [La Cosa Nostra] or elements thereof. However, the Indpendent Administrator's powers do not extend to collective bargaining agreements (A46).

Decree provided for the Teamster Independent Administrator to make any application to the District Court which he deemed warranted (A52), the Teamster Independent Administrator instead called upon the United States Attorney to institute contempt proceedings against Petitioner (A216).

On October 24, 1991, the United States Attorney requested the District Court (A147) that Star Market should be held in Contempt for its refusal to "obey" the Election Officer's final decision. Only then, for the first time, did Star Market learn of the existence of Henderson's "company bias" election protest – when the United States Attorney attached it to the proposed Contempt Order. Thus, when Star Market appeared before the District Court on October 28, 1991, for the hearing on the Contempt motion, it had just learned of the allegations made against it by Henderson to the Teamster Election Officer in May of 1991.

During argument before the District Court, Star Market sought again to introduce evidence of its "lack of notice" and to respond to the Teamster Election Officer's ex parte evidentiary record (A191). The District Court denied this evidentiary request as "off the wall." The transcribed argument is reproduced in the Appendix, beginning at A161. In addition, the District Court also evidenced a clear bias against all employers that had labor relations with the IBT, even through only one Local of the IBT as was Star Market's case. *Sua sponte,* the District Court opined that an "alliance" existed apparently between all employers and the old guard of the IBT (A174-A175). No record evidence to demonstrate such "alliance", or that Star Market had any part in it, exists.

Similarly, there had been no allegation or evidence that the discharge of Henderson was undertaken to promote any political position of the IBT, any racketeering activity or the presence of La Cosa Nostra in the IBT. Significantly, the Teamster Election Officer found, after reviewing the record of the Arbitration and all *ex parte*

evidence presented only to him, that Henderson's Local Union representatives had *properly represented* Henderson in the Arbitration (A114).

The Second Circuit affirmed the District Court, finding that the court-appointed Teamsters were "private parties" and the resultant lack of state action precluded due process violations, that Star Market had "waived" its rights to raise due process violations by not following the Consent Decree-created "appeal procedure," that the procedure followed by the court-appointed Teamsters satisified the norms of due process, and further holding that the Consent Decree and the issues arising under or from it were too complex to be adjudicated competently in arbitration.

REASONS FOR GRANTING THE WRIT

1. THE ORDER OF THE DISTRICT COURT IMPOSING PENALTIES OF CONTEMPT ON STAR MARKET WAS ISSUED WITHOUT DUE PROCESS, RENDERING IT A LEGAL NULLITY. STAR MARKET HAS WAIVED NONE OF ITS RIGHTS AT STAKE IN THIS APPEAL.

As soon as men decide that all means are permitted to fight an evil, then their good becomes indistinguishable from the evil that they set out to destroy.

The Judgement of the Nations,
Christopher Dawson

In finding that Star Market had waived its right to contest the denial of due process in the company bias election protest by not exhausting procedures established by the Consent Decree, the Court of Appeals failed to recall the early dictates of this Court, warning of the effects of denial of due process to any citizen, under any circumstances. The Court of Appeals was naturally interested to insure that the Consent Decree procedures, negotiated by the United States and approved by the District Court, succeeded in ridding the IBT of La Cosa

Nostra influence — a just end indeed. However, just and honorable ends cannot excuse the most unworthy and despicable of means.

The decision of the Teamster Independent Administrator, affirming the Teamster Election Officer's September 9th decision, served in effect as a default judgment, taken without notice or opportunity for Star Market to be heard. The October 29th Order of the District Court was based upon that defective order and, under the longstanding law of this Court, is a nullity. Similarly, Star Market had undertaken all legal steps which it was required to take as an employer, not party to the Consent Decree, in perfecting its appeal.

At the time when the United States Attorney sought the Contempt Order, Star Market had already been denied notice of the nature of the proceeding against it — the company bias election protest — and the benefits of such notice. It had already been denied the right to confront witnesses and evidence alleged against it or to submit evidence in its behalf. As an uninvolved employer, it had already been forced into a hostile forum and made to submit to the decision making of a Teamster, albeit a court-appointed Teamster, loyal to the opposing party in the dispute. The District Court ruled that Star Market would not be allowed to challenge these defects by offering evidence to preserve a record to support its claims of denial of due process.

By any meaningful evaluation, Star Market was treated as though it was in some kind complete and inexcusable "default" of response to Henderson's company bias election protest, although it had never received notice of the charges against it. In researching for this Petition, it was difficult to find in all the annals of judicial history a case with as bizarre a procedural history as this one. However, long ago, in an equally righteous effort to end an evil — then, the Civil War — this Court specifically condemned as "sham" the kind of

hearing offered Star Market here. In *Windsor v. McVeigh,* 93 U.S. 274 (1876), an officeholder of the Confederate States, then living behind rebel lines, was given notice of forfeiture proceedings against his property to which he responded through counsel. His appearance and answer were struck and the forfeiture order entered. Upon review, this Court reversed that forfeiture, noting as follows:

> This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect of any other tribunal. 93 U.S. at 277.

Such a proceeding was likened by the Court to a "sham and deceptive proceeding." 93 U.S. at 278. *See also, Hovey v. Elliott,* 167 U.S. 409 (1897) (citing *Windsor, supra.) Cf., Hansberry v. Lee,* 311 U.S. 32 (1940) (reversal of res judicata effect of state judgment as a denial of procedural due process, since the parties in the action which occasioned the judgment were not parties, nor in privity with the parties, to the prior suit, nor represented in that earlier litigation.)

By being denied notice, Star Market was effectively placed in a position indistinguishable from "default", denied opportunity to challenge meaningfully the decision of the Teamster Election Officer. This Teamster Election Officer decision served as the sole basis for the District Court's "factual" findings in support of its Contempt order. Star Market was never given an opportunity to confront the Teamster Election Officer's witnesses or any documents upon which he relied. Ultimately, the burden of proving notice must fall on the joint venture of the United States Attorney and the court-appointed

Teamsters. *F.R.Civ.P. 4(c) and 4(g).*[3] They have failed to do so. Absent that notice, all else afterwards falls. Simply stated, Star Market was perfunctorily summoned to a court only to be denied its due process rights, a practice condemned by this Court for more than a century.

2. THE PETITION SHOULD BE GRANTED TO CORRECT THE DENIAL OF DUE PROCESS BY ACTIONS OF COURT-APPOINTED TEAMSTERS, THE UNITED STATES ATTORNEY AND THE DISTRICT COURT, ALL OF WHICH SERVED TO DEPRIVE STAR MARKET OF ITS CONSTITUTIONAL RIGHT TO FAIR AND IMPARTIAL HEARING UPON ADEQUATE NOTICE.

A. The United States Attorney and the Court-Appointed Teamsters Acted Jointly So As To Place Any Private Action Under The Color Of Law And Subject To Due Process.

The IBT litigation has spawned decisions of the Second Circuit which have held that the court-appointed Teamsters are "private actors" and not obliged to meet "due process" standards in their actions.[4] In dealing with Star Market's due process claims, the Second Circuit failed to accord sufficient weight to the lockstep joint action of the United States

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3. Unlike *Hicklin v. Edwards,* 226 F.2d 410 (8th Cir. 1955), where defendant in default sought to reopen judgment based on alleged lack of notice in the face of a United States Marshall's return of service, imposing on defendant a burden of strong and convincing evidence, the United States Attorney has never proved a return of service to establish Star Market received the company bias election protest any earlier that October 24, 1991. Thus, having made the allegation of non-service and attempted to introduce evidence of that fact, Star Market has no further evidentiary burdens on this point. Indeed, were it otherwise, Star Market would left the impossible burden of proof of a negative fact, i.e., proving that service did not happen.

4. *See, e.g., U.S. v. I.B.T. et al. (Dominic Senese and Joseph Talerico),* 941 F.2d 1292 (2nd Cir. 1991).

Attorney, as plaintiff's counsel, and the court-appointed Teamsters. Private action under the color of law has long been held by this Court to impose due process standards – when private actors perform a public function. This concept was first articulated in *Smith v. Allwright,* 321 U.S. 649 (1944). In *Smith,* faced with allegations that the Democratic Party refused to admit blacks, the Court found that the Texas election system made party primary elections an integral part of the overall election scheme, placed initial management of primaries under the political parties and, in subjecting election management to scrutiny, found that the parties performed a state function. *See also, Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Lugar v. Edmonson Oil Company,* 457 U.S. 922 (1982).

The United States Attorney's Office and the court-appointed Teamsters acted jointly and in concert to deny Star Market any meaningful due process. While acting in a quasi-judicial role, the Teamster Election Officer failed to give notice to Star Market, causing it to become locked into an unconfronted and undisclosed record. In doing so, the Teamster Election Officer was acting to advance rights of the Teamster protestant which belied any claimed impartiality in his quasi-judicial role. By moving for a Contempt Order to enforce these rights, the United States Attorney joined with the court-appointed Teamsters and adopted their failure of notice to their mutual benefit and Star Market's detriment. In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), in striking down a "No Blacks" restriction by a restaurant operating in space leased to it by the state, the Court looked to the interdependence of the actors and found it to be so close as to be regarded a "joint venture." Here, the commitment of the United States Attorney and the court-appointed Teamsters to achieve their mutually desired remedies was much closer – a truly tandem operation.

The Consent Decree was the end product of the federal government's racketeering action against the

IBT and its La Cosa Nostra influence. The United States Attorney relied upon the court-appointed Teamsters to implement remedial steps which it had created in negotiations with the IBT. Throughout the case, the court-appointed Teamsters relied upon and sought immediate assistance of the United States Attorney's Office and the District Court to enforce their orders. The lockstep interplay of conduct between the federal officers, both Executive and Judicial, and these court-appointed Teamsters belies any attempt to assert a claim of private action. Much as in *Burton,* the United States and the court-appointed Teamsters have been engaged in a joint venture, through the power of the District Court, to restructure the IBT from the grass roots level upwards.

B. THE JOINT DENIAL BY THE UNITED STATES ATTORNEY AND THE COURT-APPOINTED TEAMSTERS OF NOTICE, CONFRONTATION OF EVIDENCE AND IMPARTIAL HEARING VIOLATED STAR MARKET'S RIGHT TO DUE PROCESS.

While the right to due process is absolute, what constitutes due process varies in different factual situations. *Matthews v. Eldridge,* 424 U.S. 319 (1976). Over time, the Court has defined the minimum requirements of due process in a number of opinions which can be briefly summarized as: 1) adequate notice, *Goss v. Lopez,* 419 U.S. 565 (1975); 2) adequate opportunity for a hearing, *Armstrong v. Manzo,* 380 U.S. 545 (1965); the right to introduce evidence, *Baltimore & Ohio Railroad v. United States,* 298 U.S. 349 (1936); and the right to confront and cross-examine witnesses, *Wolff v. McDonnell,* 418 U.S. 539 (1974). In addition, due process requires that the proceedings occur before an impartial decision maker. *Schweiker v. McClure,* 456 U.S. 188 (1982); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

Star Market was denied notice of the company bias election protest from May 10th until after the Teamster Election Officer had ruled, ordering Star Market to reinstate Henderson. Star Market's first notice of the

actual existence of any basis for continued Teamster Election Officer proceedings against it came in the Contempt proceeding itself. By then, the evidentiary door was closed. There had never been an opportunity for Star Market to introduce evidence on its behalf to dispel the Teamster Election Officer's self-serving finding of "pretext" in a routine Star Market memo, nor had Star ever confronted the evidence relied upon by the Teamster Election Officer in reaching his decision.

Further, Star Market was denied an impartial decision maker by this process. The Teamster Election Officer and Independent Administrator serve as employees of the IBT and as appointees of the District Court. The Teamster Independent Administrator functioned almost with the combined power of the General President and General Executive Board of the IBT. Both court-appointed Teamsters were charged with protecting the internal IBT rights of Teamsters -not with being "impartial" to employers. Star Market had never agreed or bargained for such decision makers, i.e., Teamsters.

The Teamster litigation has come largely to a close but this matter stands as a startling precedent and blueprint for future abuse. Can the United States annoint its "private parties" to act on its behalf through any Consent Decree, cause them to make quasi- judicial determinations without any pretense at due process and then bootstrap the result of this sham private action by non- evidentiary, summary Contempt proceedings to accomplish the ends desired by the federal government when it began the program? Perhaps, the abuses set forth were no more that the inadvertent consequences of the United States' zeal to rid the IBT of organized crime. Still, they have served to deny Star Market of its day in court and violated its rights under the Constitution and federal law. In retrospect, these procedures were far more "sham" than that which was condemned in *Windsor v. McVeigh, supra.*

3. THE PETITION SHOULD BE GRANTED TO CORRECT THE WHOLESALE SPLINTERING OF WELL-ESTABLISHED FEDERAL LABOR LAW PRECEDENTS.

A. THE COURT-APPOINTED TEAMSTERS AND THE DISTRICT COURT WERE DENIED SUBJECT MATTER JURISDICTION OVER STAR MARKET ON THIS PRECISE ISSUE BY THE NATIONAL LABOR RELATIONS ACT.

Unless otherwise provided by statute or a judicially recognized exception, this Court has long held that the NLRB has exclusive jurisdiction to remedy claims arguably within the scope of sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §157 and 158 ("Act"). *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *National Licorice Co. v. NLRB,* 309 U.S. 350 (1940). Section 7 of the Act guarantees the rights of employees to organize or join labor organizations, to select agents for of collective bargaining, and to otherwise act concertedly for mutual aid and protection. Section 8 of the Act reinforces these rights by enumerating unfair labor practices which unlawfully infringe on them.

If proved, the conduct complained of by Henderson in the identical grievance and the second election protest — alleging company bias based on his intra union activities would be an unfair labor practice. Allegations of employer interference or retaliation in union election activities traditionally have been resolved by the NLRB, pursuant to the Court's exclusivity rulings. *See, e.g., A.P.F. Electronics, Inc.,* 257 NLRB 488 (1981). Indeed, Henderson actually filed just such a Charge with the NLRB on these precise facts, which Charge is still pending at this time. The effect of the Teamster Election Officer's decision and the District Court's Contempt Order was to adjudicate Henderson's Unfair Labor Practice Charge outside the NLRB process. When their

decisions are considered in comparison with the pending NLRB proceeding, the full splintering consequences of their actions become apparent.

Is the NLRB now precluded by the District Court's decision from finding other than that Henderson was the victim of an unfair labor practice – discrimination based on his union activities? Is the NLRB permitted different factual findings from the Election Officer's "findings" in considering Henderson's charges? Soon, the NLRB may have conducted evidentiary hearings giving Star Market its day in court to confront the former *ex parte* evidence, if such "evidence" is even admissible. If the NLRB then determines on the full and confronted record that Henderson was properly discharged, Star Market will be denied the benefit of the NLRB award by the District Court's Order. The effect of the District Court's Order is thus to preempt the NLRB's discretion and render any result that varies from the District Court a nullity. To even pose these legal dilemmas makes it very clear why the *Garmon* case was decided as it was by this Court.

B. THE ELECTION OFFICER'S DECISION DISRUPTS WELL ESTABLISHED FEDERAL LABOR LAW UNDER SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT BY CREATING CONFLICTING AND INCONSISTENT REMEDIES FROM COLLECTIVELY BARGAINED ARBITRATION.

In similar vein to this Court's deference to NLRB expertise in protective/prohibited cases, Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185, has also earned this Court's broad and unwaivering support for the preemptive effect of arbitration. The Court has routinely held that individuals seeking to challenge an allegedly defective arbitration award must avail themselves of the exclusive remedies of Section 301. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Smith v. Evening News Asso.*, 371 U.S. 195 (1962); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95

(1962); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). The NLRB itself defers to arbitration so long as the claim is factually parallel and the arbitrator had the evidence before him. *Olin Corporation,* 228 N.L.R.B. 88 (1987).[5]

Historically, the Court has defended, against repeated attacks by both the federal and state judiciaries, the value of labor arbitration and has sought to protect it as a vital mechanism for labor peace. *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). Moreover, even the past caution of the Court in weighing arbitration as a "comparable forum" for the vindication of competing legal rights, originally expressed in *Barrentine v. Arkansas Best Freight Systems,* 450 U.S. 728 (1981) and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), has recently been reconsidered and rejected in *Gilmer v. Interstate/Johnson Lane Corp.,* ____U.S. ____, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

In *Gilmer,* the Court re-endorsed the value of arbitration as a prompt, cost-effective means of dispute resolution that competently dealt with the due process rights of all parties. Since *Gilmer,* the federal courts have begun to expand arbitration as a compulsory means of dispute resolution. *See, e.g., Mago v. Shearson Lehman Hutton,* 1992 U.S. App. LEXIS 1694 (9th Cir. 1992); *Dancu v. Coopers & Lybrand,* 778 F.Supp. 832 (E.D.Pa.

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5. By the court-appointed Teamsters' admission, no basis exists for suit under section 301 of the LMRA. The Teamster Election officer concedes that Henderson was fairly represented by the IBT. Where the collective bargaining agreement contains exclusive and final procedures for the resolution of employee grievances, an employee will be prohibited from bringing an action under section 301 absent an allegation that his union breached its duty of fair representation. *Alford v. General Motors Corp.,* 926 F.2d 528 (6th Cir. 19919), citing *Vaca v. Sipes, supra* at Note 1.

1991). The *Gilmer* holding is best seen as a reinforcement of this Court's original reluctance to disturb arbitration results, except for certain limited areas expressly created by Congress. In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), this court held:

> As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision. 484 U.S. at 38.

Here, the Second Circuit has rejected *en toto* this historically approved value of labor arbitration in the context of this Consent Decree, claiming that the Decree was too complex to be allowed to go to arbitration. In doing so, the Second Circuit was consistent with its decision in *United States of America v. International Brotherhood of Teamsters et al. (Yellow Freight)*, 948 F.2d 98 (1991), where it decided that the NLRB was "too glacial" to be permitted to hear those matters which ordinarily would fall within its exclusive jurisdiction.[6] While there may have been some short term, "end justifies the means" logic to this analysis in *Yellow Freight,* there is none here. The bargained-for arbitration process at Star Market has been emasculated, totally and without redemption unless this Court acts to remedy this injury.

This judicial activism fails to recognize the necessary restraints imposed upon the courts below by the

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6. Historically, this court has declined to give weight to complaints of NLRB delay as a basis to deprive the agency of jurisdiction. *Cf. Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (A.F.L.) et al.*, 346 U.S. 485 (1953) (Noting and failing to follow the dissenting opinion of the Pennsylvania Supreme Court which considered the NLRB to be an inadequate federal remedy because of its slow administrative processes and which would have sustained a state court injunction barring further action by the NLRB.)

nature of the proceedings before them. The government's litigation against the IBT was brought under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*, with the intent to drive organized crime influence from the hierarchy of the International levels of the IBT. It was not originally focused, nor was there any point throughout the original proceedings, that the focus was changed to aim at collective bargaining relationships, especially relationships between individual locals of the IBT and the employers with which these locals bargain. Nor was the litigation ever intended to right every alleged wrong under every Teamster contract in the United States.

In *Presley v. Etowah County Commission et al.*, U.S. ____, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), the Court rejected an attempt by the United States Justice Department to create expanded forms of relief for black county commissioners whose responsibilities had been reduced by subsequent changes in the political structure. The Justice Department sought to enlarge the scope of a consent decree originally arising under the Voting Rights Act, 42 U.S.C. §1973c. In *Presley,* the Justice Department sought to have the Court defer to its expertise in voting rights matters and allow it to fashion social remedies it thought best. This Court rejected that attempt at federal expansionism and, while endorsing the concept of liberalism of remedy within the constraints of the Act, declined to extend construction beyond the Voting Rights Acts' purview.

In effect, the rejection of both impartial Arbitration and the NLRB as the only legal resolution mechanisms for Henderson's claims is a bold attempt to expand the powers of the federal government as embodied in the United States Attorney, acting through the court-appointed Teamsters under the Consent Decree. In his decision, the Teamster Election Officer cited the body of NLRB law represented by *Olin Corporation, supra,* which allows the NLRB to decline to defer to arbitration when not all relevant issues had been presented to the

arbitrator. Here, the issue of company bias against Henderson was presented to the Arbitrator, as was Henderson's evidence in support of his claim. It is instructive that the evidence which the Teamster Election Officer cited as not being before the Arbitrator, thus justifying his refusal not to defer to the arbitration, was the same *ex parte* evidence which he had failed to disclose to Star Market until his September 9th order.

The government has suggested that the Consent Decree itself created some new bundle of rights to the benefit of Henderson which stand independent of those created by Congress under existing federal labor law. In *Presley, supra,* the Court made clear that a consent decree finds its limits in the statute upon which the decree's underlying litigation was based. Any claim of expanded rights must necessarily arise from the government's choice to base its suit against the internal workings of the IBT under RICO. However, under the *Presley* analysis, Star Market would have been entitled to a trial by jury under RICO, if the results of the arbitration were being attacked. Simply put, the United States Attorney's course of conduct, implemented by the Court Appointed Officers, operates much as did the Justice Department's conduct in *Presley,* to create inappropriate avenues to relief otherwise unavailable under federal law – in the process depriving Star Market of its day in court.

It would certainly be ironic if the joint action of the United States Attorney and the court-appointed Teamsters were able to deprive Star Market of its fair day in court – all under the banner of ridding the IBT of gangsterism. In doing so, their action abdicates almost every principle of federal labor law developed by this Court over the last 40 years and reverses the Court's clear mandates in *Presley* and *Gilmer*. It would be doubly ironic in that there is not one scintilla of evidence that racketeering or organized crime influence had anything to do with Henderson's discharge. The uncontroverted evidence after a full and fair hearing, at which

Henderson was properly represented by his Local Union, was that Henderson was simply dishonest in his dealings with his employer – stealing time for which he was being paid.

CONCLUSION

Neither the good intentions of the United States Attorney and the District Court or the exemplary nature of the ends achieved in cleaning up the IBT, no matter how resoundingly they may be recited by the government in opposing this Petition, justify the arbitrary and legally violative means used in this case. They have sought to expand improperly the limited scope of the remedies legitimately achieved in litigation with the IBT. Unless corrected by this Court, the judicially-approved conduct of the federal government, by and through its anointed private actors, serves as a terrifying blueprint for the future. Creation of nominally "private persons", whose true function is to allow the federal government to ignore the private rights of citizens, which it otherwise must honor, to pursue essentially social goals which it deems desirable, is wrong. The government's course of conduct in this matter, as it was in *Presley,* is proof that future abuse is likely. The danger is real that such a blueprint will live long after the IBT litigation has become a fascinating but closed chapter in American labor history.

Moreover, it is imperative that the Court act to reaffirm, protect and preserve the coherent, integrated and valued scheme of rights and remedies embodied in the federal labor law. This Court should take the opportunity that this Petition offers to reassert the value of labor arbitration and NLRB preemption, along with the sound principles of judicial economy that underlie the longstanding concepts of deferral endorsed by this Court. Petitioner therefore respectfully suggests that it is urgent that the Court speak to these issues and grant its

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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